

Academic Responses to the TRIPS/WTO Situation

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What follows is largely a combination of mixed personal and professional reactions to the views of Professor Pamela Samuelson and of certain other legal scholars who have written about some of the problems she raises. A collateral source will be some of the papers from a recent symposium at Vanderbilt University, which was organized, introduced, and headed by Professor Jerome Reichman.¹ Professor Reichman has no peer in the study of international aspects of intellectual property and is a welcome contributor to the University of Virginia Symposium on Intellectual Property Law in the International Marketplace.

I shall also draw on a searching article by David Nimmer,² the current editor of *Nimmer on Copyright*, which is surely the most influential treatise in the field (meaning no disrespect to Professors Goldstein, Abrams, and others).

Scholars are tempted to think that their own vigorous opposition to the views of Bruce A. Lehman, U.S. Commissioner of Patents and Trademarks, was influential in the dramatic put-down of Lehman's extreme positions at the December 1996 WIPO meeting in Geneva.³ It is more likely, however, that opposition by well-represented trade groups carried more weight. Trade groups wield the heavy artillery; we academics, I suspect, are merely sharpshooters. Sharpshooters, however, can inflict critical casualties.

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1. 29 Vand. J. Transnat'l L. 363-690 (1996).

2. David Nimmer, *The End of Copyright*, 48 Vand. L. Rev. 1385 (1995).

3. See Pamela Samuelson, *The U.S. Digital Agenda at WIPO*, 37 Va. J. Int'l L. 369.

Professor Reichman's introduction to the Vanderbilt symposium issue avoids the polemical issues and focuses instead on matters of global sweep. One of the contributors to that symposium, Professor Peter Jaszi, is concerned that the copyright clause of the U.S. Constitution and, more specifically, its assertion that copyright and patents can exist only for limited times, are becoming obsolete.⁴ There is no authoritative method for determining the appropriate duration of a copyright or a patent, but copyright protection has expanded significantly since its inception, when authors were afforded a fourteen-year, once renewable term of protection; now, protection lasts for a period of life plus fifty years, and prolongment to life plus seventy years is a distinct possibility. A new provision of U.S. copyright law even gives performers a right against 'bootlegged' performances which has no time limit at all.⁵

Furthermore, provisions in the current international agreements, and now also in the U.S. statute,⁶ propose to *revive* copyright in works that were thought never to have entered copyright, or which were thought to have fallen into the public domain. Jaszi suggests, indeed predicts, that the next step will be to ensure copyright in domestic works that bore no notice when notice was required, or that were not renewed when renewal was still required.⁷ Jaszi sees the present law regarding works of foreign origin as a precursor to similar changes in the laws pertaining to domestic works.⁸

At the Vanderbilt Symposium, Professor Marci Hamilton expressed concern regarding the preservation of what she labels the "free use zone" of classic copyright, which she, like Samuelson, believes to be threatened by current proposals such as the one for monitoring performance of music. She believes that the monitoring arrangements will go too far in their restriction of performance, especially of popular music.⁹

4. See generally Peter A. Jaszi, Goodbye to All That—A Reluctant (and Perhaps Premature) Adieu to a Constitutionally-Grounded Discourse of Public Interest in Copyright Law, 29 Vand. J. Transnat'l L. 595 (1996) (arguing the need to develop new, policy-grounded arguments that support the public domain of intellectual property).

5. 17 U.S.C. § 1101 (1994) (allowing remedy for unauthorized fixing and trafficking in sound recording and music videos).

6. 17 U.S.C. § 401(a).

7. See Jaszi, *supra* note 4, at 596 (predicting that the Uruguay Round Agreement Act's provisions to extend copyright protection will be carried over to domestic legislation).

8. *Id.* at 608.

9. Marci A. Hamilton, The TRIPs Agreement: Imperialistic, Outdated, and Overprotective, 29 Vand. J. Transnat'l L. 613, 623 (1996).

The first-sale doctrine permits the buyer of a copyrighted work—for example, a library—to use that copy for browsing and borrowing.¹⁰ It is this important privilege that Samuelson and others believe the Lehman proposals threaten.

For me, the most unsettling contribution to the Vanderbilt symposium is that of Professor Hugh Hansen.¹¹ Hansen struck a sensitive nerve when he characterized earlier writers on copyright law as a “secular priesthood” which takes pains to protect such exotic flowers as the idea-expression distinction, conceptual separability, and originality.¹²

Using religious metaphors, Hansen implies that we of the old priesthood are overly protectionist, in part because many of us are frustrated creators who for selfish reasons have not shared popular disregard for copyright.¹³ I do not think that this implication is either fair or correct, and I cite in this Comment to older academics who *oppose* increased levels of protection for original work. Even more telling was the written disapproval of older copyright scholars to the proposed twenty-year extension of the term of copyright.¹⁴ We in the old priesthood may have been bemused by esoterica, but we have not been uniformly expansionist.

Before I leave the ranks of critics who resist expansionist views, I should tip my hat to several admirable individuals who are skeptical about measures that would enlarge the gains of copyright holders. Those I have in mind express staunch support for a capacious public domain and for a comparatively confined set of authors’ and publishers’ rights. Those figures include David Lange of Duke University,¹⁵ Jessica Litman of Wayne State University,¹⁶ and

10. 17 U.S.C. § 109(a).

11. Hugh C. Hansen, *International Copyright: An Unorthodox Analysis*, 29 *Vand. J. Transnat’l L.* 579 (1996).

12. *Id.* at 582-83.

13. *Id.* at 583.

14. See Testimony of Dennis S. Karjala, Hearings on H.R. 989, Before the Subcomm. on Courts and Intellectual Property, 104th Cong., 1st Sess. (1995). Karjala submitted a statement entitled “Proposed Extension of Copyright Protection Harms the Public.” The statement was hurriedly circulated and missed a number of assured signers, including the present author, but collected fifty signatures nonetheless.

15. David Lange, *At Play in the Fields of the Word: Copyright and the Construction of Authorship in the Post-Literate Millennium*, 55 *Law & Contemp. Probs.* 139 (1992).

16. Jessica Litman, *The Public Domain*, 39 *Emory L.J.* 965 (1990); see also Diane Leenheer Zimmerman, *Copyright in Cyberspace: Don’t Throw Out the Public Interest with the Bath Water*, *Ann. Surv. Am. L.* 403 (1994).

James Boyle of American University, the last of whom has given us a pyrotechnic display in his book *Shamans, Software and Spleens*.¹⁷

Our fellow panelist, Professor Neil Netanel, has elsewhere exposed most authoritatively a gap (or is it a gulf?) between what he classifies as a neoclassical economics approach to copyright¹⁸ and a "democratic paradigm" model of copyright protection.¹⁹ Crudely put, the neoclassical economics approach attempts to help rights holders gain control of almost every profitable use of a work.²⁰ The "democratic paradigm," which so far is dominant and which receives Netanel's endorsement, allows "wiggle room" for users of copyright works.²¹

I promised to say something about the views of David Nimmer, who ably maintains the scholarly treatise launched by his scholarly father. Nimmer has published an almost ferocious blast at the Lehman proposals. In an article entitled "The End of Copyright,"²² Nimmer opines that the Lehman proposals would import some alien notions into the law, for example the tenets of the Rome Convention, to which the United States has never become a party.²³

Nimmer seriously contends that TRIPS may well undo the Supreme Court's holding in *Feist Publications v. Rural Telephone Service Co.* that "[the telephone book] white pages do not satisfy the minimum standards for constitutional protection,"²⁴ and, more imaginatively, that a TRIPS-convened panel might unravel the protection for parody that was established in *Campbell v. Acuff-Rose Music*.²⁵ Faced with such enormities, Nimmer suggests ways in which the United States can "successfully play the role of the elephant in international trade. We are the largest world trader, and could try to throw our weight around to squash opponents."²⁶ Maybe that is what we tried to do at Geneva, but Nimmer did not approve of the direction that attempt took.

17. James Boyle, *Shamans, Software and Spleens* 168-69 (1996).

18. See Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 Yale L.J. 283, 288 (1996) (arguing that copyright is a state measure that uses the market to enhance democracy).

19. *Id.*

20. *Id.*

21. *Id.* at 339.

22. See Nimmer, *supra* note 2, at 1385.

23. *Id.* at 1399.

24. 499 U.S. 340, 362 (1991).

25. 510 U.S. 569 (1994).

26. Nimmer, *supra* note 2, at 1417.

I must delay no longer in carrying out my formal function on the panel, which is to comment on Professor Pamela Samuelson's presentation. This I can do easily and briefly: I agree with it.

Her manner of presentation, moreover, is unusual—and welcome. Although I have canvassed no sources other than my failing memory, I can think of no more dramatic account of an episode in the politics of copyright evolution than her analytical narrative of doctrinal and policy issues.

Storytelling has become a fashionable mode of legal writing. The compelling story Professor Samuelson has told us revolves around Commissioner Lehman's efforts (which are highly political but not partisan) to change the direction of copyright law. I will not go so far as to portray the Commissioner as the villain of Samuelson's piece; rather, he is the protagonist of powerful interests (notably movie-makers) who would benefit from an expansion of copyright protection. Fortunately (at least from the standpoint of students like myself who take a cautious stance toward enlargements of copyright protection), powerful antagonists manned the battlements in Geneva and repelled most of Commissioner Lehman's agenda. Professor Samuelson recounts in considerable detail how all of this came to be, notably how the action shifted from the congressional arena to the international arena and how it was expected to return to Congress when a treaty was completed that embodied the views of Commissioner Lehman and his allies.

The story is unfinished, but at the conclusion of the Geneva meetings it seemed clear that most of the revisionist agenda had failed. If the innate impulse of copyright experts is to extend the scope of protection (a stance that I have already rejected as characteristic of American academics), then one can understand why those experts are attracted to the Lehman proposals. We must be grateful, therefore, for the presence at Geneva of the anti-Lehman heavy artillery described by Samuelson, as well as for such sharpshooters as Jerome Reichman and David Nimmer.

